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No. 00-376

In the Supreme Court of the United States

WILLIAM G. PATTERSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Assistant Attorney General
DAVID M. COHEN
JOHN C. HOYLE
JAMES M. KINSELLA
KATHERINE M. KELLY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

15pp

QUESTION PRESENTED

Whether a member of the United States Army Reserve whose claim for disability retirement benefits has been fully considered by the Army Board for Correction of Military Records was also entitled to a hearing before a military Physical Evaluation Board.

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OPINIONS BELOW

The per curiam judgment of the court of appeals (Pet. App. 1a-2a) is not yet reported. The opinion of the Court of Federal Claims (Pet. App. 3a-13a) is reported at 44 Fed. Cl. 468. The opinion of the Army Board for Correction of Military Records (ABCMR) (Pet. App. 14a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 2000. The petition for a writ of certiorari was filed on September 8, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title 10 of the United States Code, Section 1204 governs the eligibility for physical disability retirement of members of the armed forces who are on active duty for periods of 30 days or less. This statutory provision requires, among other things, that to be eligible for disability retirement, the service member must be "unfit to perform the duties of his office, grade, rank, or rating because of physical disability," and must have incurred that disability as the "proximate result of performing active duty or inactive-duty training." 10 U.S.C. 1204 (1994 & Supp. IV 1998). In addition, 10 U.S.C. 1214 provides the procedural safeguard that, "[n]o member of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it." Section 1214 is relevant only when a branch of the armed forces takes action to involuntarily retire or separate a service member on the basis of a physical disability.

2. Petitioner began serving as a dentist in the United States Army Reserve on November 24, 1977. C.A. App. 138-139, 149. While attending his annual duty training from April 1, 1989 to April 14, 1989, petitioner sought medical attention from Army medical staff for chest pain and was diagnosed with probable heart disease. Pet. App. 4a, 17a. On April 13, 1989, petitioner underwent a cardiac catheterization and angioplasty at Fitzsimons Army Medical Center. *Id.* at 17a. During the procedure, petitioner went into cardiac arrest. *Ibid.* Petitioner was resuscitated and underwent immediate coronary artery bypass surgery. *Ibid.*

Before a service member may be retired or separated for physical disability, he is entitled to a hearing on request. 10 U.S.C. 1214. Because of petitioner's critical

medical condition, an expeditious retirement for the benefit of his family was under consideration, and toward that end a medical evaluation board (MEB) was convened while petitioner was still undergoing bypass surgery. C.A. App. 29. The Medical Board Narrative Summary stated that petitioner's "prognosis is grim and he may not survive surgery. [His records are] therefore referred to the physical evaluation board [PEB]." Pet. App. 17a.

Petitioner's records do not indicate that a Physical Evaluation Board was ever convened, or that petitioner ever requested a Physical Evaluation Board hearing after April 14, 1989. Pet. App. 18a; see Pet. 14 (noting only that petitioner's wife requested a PEB during his bypass surgery).

Petitioner continued his service as a dentist in the Army Reserve long after his surgery in April 1989. See, *e.g.*, C.A. App. 70. His records show that he was assigned to periods of active duty in July 1990, August 1993, and July 1994 (*id.* at 152, 156, 161-162), earned retirement credits for various periods of time from November 1989 through November 1993 (*id.* at 149), and had assignments to perform military duties as a dentist during periods from July 1989 to October 1993. *Id.* at 140. In fact, petitioner was promoted to the rank of Lieutenant Colonel on August 24, 1991. *Id.* at 160.

On September 10, 1996, petitioner was not selected for promotion to the rank of Colonel. C.A. App. 30. On June 25, 1997, he was not selected for retention, resulting in his retirement. *Id.* at 31. Nothing in petitioner's records indicates that physical disability was the reason for either of these decisions.[1] *Id.* at 30-31.

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[1] The only reference in the record to his physical condition in regard to potential retirement or separation is a reference in the

3. On February 2, 1994, while petitioner was still serving in the Army Reserve, he had filed an application with the Army Board for Correction of Military Records (ABCMR) requesting that his military records be corrected to "show that he was retired in April 1989 with a 100 percent disability rating."[2] Pet. App. 15a; see also *id.* at 5a. Petitioner alleged that "he suffered from injury and near death as a proximate cause of his military service due to complications from an angioplasty performed at Fitzsimons Army Medical Center (FAMC); and that he should have been referred for disability processing." *Id.* at 15a.

The ABCMR denied petitioner's application in a decision dated October 29, 1997. Pet. App. 14a-22a. The ABCMR concluded that there "were no negligent acts committed by medical personnel that caused this arrest and it was not the proximate result of performing military duty. His cardiac arrest was the main result of his prior existing heart disease and nothing that occurred during his active duty period can be said to have been the main cause of his arrest and present impairment." *Id.* at 21a. Because petitioner failed to show that his alleged disability was the

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ABCMR decision to a February 9, 1993 memorandum by his Reserve commander notifying petitioner that he was initiating action to separate him from the Army Reserve because of repetitive failure of the Army Physical Fitness Test, and not mentioning any physical disability. Pet. App. 18a. Petitioner continued to serve in the Army Reserve for nearly five years after the date of this memorandum. C.A. App. 31.

[2] His ABCMR application is somewhat misleading because it states that his date of discharge or release from active duty was February 9, 1993 (C.A. App. 130), but instead, petitioner's records show that he continued to perform Reserve duties at least four years after that. *Id.* at 140, 152, 156.

"proximate result of performing active duty or inactive-duty training," the Board held that he was not entitled to prevail under 10 U.S.C. 1204 (1994 & Supp. IV 1998) or Army Regulation (AR) 635-40, § 8-2(a).[3]

4. On June 2, 1998, petitioner filed a complaint in the United States Court of Federal Claims challenging the ABCMR decision. Pet. App. 7a. In its opinion, filed August 11, 1999, the Court of Federal Claims sustained the ABCMR decision, finding that (1) it was not legal error for the ABCMR to deny petitioner disability retirement without convening a PEB; (2) petitioner waived any argument that his April 1989 heart catheterization was performed involuntarily because he had not raised that issue to the ABCMR; (3) in any case, the assertion of involuntariness had no direct bearing on whether his disability was service connected; (4) the ABCMR did not commit factual error by failing to find that an artery in petitioner's heart had been severed during medical procedures performed upon him; and (5) the ABCMR did not commit legal error in concluding that there was no evidence that petitioner's cardiac arrest was outside the normally accepted inherent risks of catheterization or angioplasty, pursuant to AR 635-40. Pet. App. 3a-13a.

5. The United States Court of Appeals for the Federal Circuit entered judgment without an opinion

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[3] The U.S. Army Physical Disability Agency, in its advisory opinion to the ABCMR, also concluded that there was no evidence to establish that the catheterization process was the main cause of petitioner's cardiac arrest, nor was there any evidence that this result was outside the normally accepted inherent risks of such a procedure. Pet. App. 18a-19a. Accordingly, the Physical Disability Agency advised that "the applicable legal standards for the award of compensation have clearly not been met in this case." *Id.* at 19a.

on June 12, 2000, affirming the decision of the Court of Federal Claims. Pet. App. 1a-2a.

ARGUMENT

Petitioner contends that he had a statutory and Fifth Amendment right to a hearing before a Physical Evaluation Board to determine his eligibility for disability retirement benefits. Petitioner was not entitled to a Physical Evaluation Board hearing, however, under either 10 U.S.C. 1214 or the Fifth Amendment. Moreover, the ABCMR review of his application satisfied any due process rights petitioner may have had. Thus, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. a. Petitioner argues that he is entitled to a hearing under 10 U.S.C. 1214, which provides "[n]o member of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it." By its express terms, this provision applies only when a branch of the armed forces takes action to retire or separate a service member on the basis of a physical disability. See *Charles* v. *Rice*, 28 F.3d 1312, 1320-1321 (1st Cir. 1994) ("A 'physical disability' must be the reason for discharge before a board is convened. *See* 10 U.S.C. § 1214."); *Quailes* v. *United States*, 25 Cl. Ct. 659, 663 (1992) ("Plaintiff does not have a valid claim under 10 U.S.C. §§ 1214, 1218 because both statutes address situations, unlike plaintiff's, wherein the member is separated for physical disability. Plaintiff in this case was separated for misconduct, not disability."); *Brown* v. *United States*, 396 F.2d 989, 995 (Ct. Cl. 1968) ("While 10 U.S.C. § 1214 (1964) mandates a 'full and fair' hearing for a member of the armed

services before separation for physical disability, he may be (and often is) separated for reasons other than disability (e.g., longevity) without a hearing even though he believes he is entitled to disability-retirement pay."); *Powell* v. *Marsh*, 560 F. Supp. 636, 640 (D.D.C. 1983) ("It is clear from the terms of [10 U.S.C. 1214] that it was not intended to apply to the facts of this case. Here, plaintiff is not being *forced* to retire because of physical disability. Rather, he is *voluntarily* seeking the correction of his military records to indicate that he retired disabled.") (emphasis added).

The Army did not retire or separate petitioner on the basis of a physical disability. After petitioner recovered from the catheterization, angioplasty, and bypass surgery in 1989, he was deemed fit for duty, continued his service as a dentist in the Army Reserve, and was promoted in 1991. C.A. App. 160. The Army Reserve never attempted to separate or retire him for any physical disability after April 1989. Instead, petitioner was not selected for retention in 1997, and he was retired. *Id.* at 31. Nothing in petitioner's records indicates that he was forced to retire due to disability. Therefore, 10 U.S.C. 1214 does not apply.[4]

b. Petitioner also cites Army Regulations which he interprets to require that a Medical Evaluation Board

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[4] The fact that a Medical Evaluation Board, during petitioner's April 1989 surgery, recommended the convening of a Physical Evaluation Board, did not give petitioner a statutory right to such a hearing. Pet. 4, 7-8, 13. The April 1989 recommendation was based upon the possibility, at the time of the surgery, that petitioner might not survive surgery. Pet. App. 17a. But petitioner did survive the surgery and resumed his Army Reserve service. *Id.* at 5a. As discussed above, he was not retired or separated based on physical disability and thus 10 U.S.C. 1214 (1994 & Supp. IV 1998) does not apply.

refer a case to a Physical Evaluation Board. Pet. 16-18. The Medical Evaluation Board convened during petitioner's surgery did just that. Pet. App. 15a. Nothing in these regulations, however, requires that a hearing be held before a Physical Evaluation Board. Because petitioner recovered from his surgery, continued his military service, and was not separated based on any medical disability, he had no right to a Physical Evaluation Board hearing.

Even if such a right existed, petitioner did not exercise it. There is no indication in the record that petitioner mentioned a Physical Evaluation Board until five years after his surgery when he filed his claim with the ABCMR. While petitioner noted in his ABCMR application that he had not received a Physical Evaluation Board hearing, he did not ask the ABCMR to convene such a hearing or make a determination that the Army erred in not conducting a hearing. Pet. App. 15a. Instead, petitioner asked the ABCMR to undertake the same inquiry that a Physical Evaluation Board would have made and find that he should be medically retired at a disability rate of 100%, effective as of April 1989. *Ibid.* In disability cases, both military boards of correction, such as the ABCMR, and review boards, such as a Physical Evaluation Board, are "competent to make a disability determination in the first instance." *Sawyer* v. *United States*, 930 F.2d 1577, 1581 (Fed. Cir. 1991).

2. a. Petitioner also errs in contending that the he is entitled to a Physical Evaluation Board hearing under the Due Process Clause of the Fifth Amendment. Petitioner had no property interest in disability retirement. Due process is a safeguard to protect interests "that a person has already acquired in specific benefits." *Board of Regents* v. *Roth*, 408 U.S. 564, 576 (1972).

"The principle is well established that there is no vested right to Federal employment or to the privileges of retirement thereby." *Norman* v. *United States*, 392 F.2d 255, 259 (Ct. Cl. 1968), cert. denied, 393 U.S. 1018 (1969). A service member's entitlement to pay, including retirement pay, is dependent upon his ability to fulfill statutory prerequisites. *Wyatt* v. *United States*, 2 F.3d 398, 400 (Fed. Cir. 1993). Accordingly, this Court has "never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment." *Lyng* v. *Payne*, 476 U.S. 926, 942 (1986) (citing *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 n.8 (1985)). Thus, petitioner, as a mere unsuccessful applicant, holds no property right to disability retirement.[5]

b. Even if petitioner could establish a property right to disability retirement, the ABCMR review process provided petitioner with due process. As the Federal Circuit stated in *Sawyer*, the ABCMR and Physical Evaluation Boards both "act on behalf of the Secretary, and we can see no reason why the secretarial responsibility over disability retirements cannot be exercised by either or both of them." *Sawyer*, 930 F.2d at 1582; see also *Ferrell* v. *United States*, 23 Cl. Ct. 562, 568 n.6 (1991) (a military records correction board "has the

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[5] Contrary to petitioner's claim, this case is not akin to *United States* v. *Larianoff*, 431 U.S. 864 (1977), in which this Court held that under a re-enlistment bonus statute, bonus levels vested when a service member agreed to re-enlist, as opposed to when the re-enlistment actually occurred. *Id.* at 877. Under 10 U.S.C. 1204 (1994 & Supp. IV. 1998), a number of prerequisites must be met before a branch of the armed services has the authority to retire a member with disability retirement pay.

power to evaluate a service member's entitlement to disability benefits and act on behalf of the Secretary just as the PEB does").

The procedures and standard of review before the ABCMR satisfy due process requirements. The fact that the ABCMR denied petitioner's application without an oral hearing does not amount to a deprivation of procedural due process. *Burns* v. *United States*, 9 Cl. Ct. 273, 279 (1985)). In presenting a claim to the ABCMR, petitioner had many of the same procedural rights he would have had before a Physical Evaluation Board. Petitioner was entitled to representation by legal counsel, see AR 15-185, § III, ¶¶ 10e-10f (making reference to applicant's counsel); petitioner "had the right to, and did, supplement the record before the ABCMR," Pet. App. 9a n.1, 15a (noting that petitioner submitted 29 documents); the ABCMR must make available to the applicant and his counsel any advisory opinions it considered, AR 15-185, § VI, ¶ 21b; the ABCMR must provide a written denial of an application explaining its legal and factual rationale, *id.* § III, ¶¶ 10d-10f; and the applicant has a right to request reconsideration of the ABCMR's decision, *id.* § VI, ¶ 22.

Contrary to petitioner's contention, Pet. 19, both a Physical Evaluation Board and the ABCMR must apply the same presumption requirements of AR 635-40, ¶ 2-2. In fact, the ABCMR decision in this case makes clear that the ABCMR applied the same Army Regulations that a Physical Evaluation Board would apply. See, *e.g.*, Pet. App. 19a (applying AR 635-40, ¶ 2-3(a)-(c), which are used by a Physical Evaluation Board).[6] And

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[6] The ABCMR decision cites a later version of the Army Regulations in which these provisions were moved to paragraph 3-3.

through its ability to obtain advisory opinions from those with specialized knowledge pursuant to AR 15-185, § VIII, ¶ 27b, the ABCMR, like a Physical Evaluation Board, has full access to medical advice. In petitioner's case, the ABCMR called upon the Army Surgeon General to provide a medical assessment of petitioner, and the U.S. Army Physical Disability Agency to provide an assessment of whether petitioner's medical problems were service-aggravated. Pet. App. 18a-19a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Assistant Attorney General
DAVID M. COHEN
JOHN C. HOYLE
JAMES M. KINSELLA
KATHERINE M. KELLY
Attorneys

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